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Supreme Court, U.S.
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No. 02-423

In The
Supreme Court of the United States

L. SATHYAVAGLSWARAN, M.D., IN HIS OFFICIAL CAPACITY AS CHIEF MEDICAL EXAMINER-CORONER OF THE COUNTY OF LOS ANGELES, AND ANTHONY T. HERNANDEZ, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE COUNTY OF LOS ANGELES CORONER'S OFFICE AND COUNTY OF LOS ANGELES DEPARTMENT OF CORONER,

Petitioners,

v.

ROBERT NEWMAN, AS FATHER AND NEXT OF KIN OF RICHARD A. NEWMAN AND BARBARA OBARSKI, AS MOTHER AND NEXT OF KIN OF KENNETH S. OBARSKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI	1
REASONS FOR DENYING THE WRIT	2
I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT	2
II. THE DECISION BELOW WAS CORRECT	3
III. FEDERAL CONSTITUTIONAL LAW DETERMINES WHETHER AN INTEREST RISES TO THE LEVEL OF A LEGITIMATE CLAIM OF ENTITLEMENT PROTECTED BY THE DUE PROCESS CLAUSE	4
IV. IN CONFORMITY WITH THE LOS ANGELES CORONER'S OFFICE CUSTOM AND POLICY, NO NOTICE AND DUE PROCESS OF ANY MANNER WAS AFFORDED TO THE NEXT OF KIN PRIOR TO THE REMOVAL AND SALE OF THEIR CHILDRENS' ORGANS	5
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991).....2, 4

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....5

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978).....4

Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358 (S.D. Cal. 1933).....3

Sinai Temple v. Kaplan, 54 Cal.App.3d 1103, 127 Cal. Rptr. 80 (1976).....3

Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995).....2, 4

STATUTES

42 U.S.C. §1983.....1, 5

MISCELLANEOUS

Fourteenth Amendment of the United States Constitution.....2

Cal. Health and Safety Code §7100.....3

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, Robert Newman, as father and next of kin of Richard A. Newman, and Barbara Obarski, as mother and next of kin of Kenneth S. Obarski, request that this Court deny the Petition for Certiorari filed by L. SATHYAVAGLSWARAN, M.D., in his official capacity as Chief Medical Examiner-Coroner of the County of Los Angeles, and ANTHONY T. HERNANDEZ, in his official capacity as Director of the County of Los Angeles Coroner's Office and COUNTY OF LOS ANGELES DEPARTMENT OF CORONER, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on April 16, 2002.

The Respondents are parents whose deceased children's corneas were removed by the Los Angeles County Coroner's Office without any notice or consent. The Coroner's Office sold the body parts of the Respondents' children to a Tissue Bank pursuant to an agreement whereby the Coroner's Office would contact the Tissue Bank upon receipt of bodies so that certain tissues could be collected. The Coroner's Office received monetary compensation for the harvested corneas pursuant to a written policy and custom between its office and the Tissue Bank.

The Respondents upon discovering these egregious acts, filed a 42 U.S.C. §1983 suit alleging a taking of their next-of-kin property rights without any due process of law. The complaint was dismissed by the District Court for failure to state a claim upon which relief could be granted. The United States District Court for the Ninth Circuit reversed the trial court holding that the long-standing recognition in the law of California paralleled the national

common law, that next of kin have the exclusive right to possess the bodies of their deceased family members creates a property interest, the deprivation of which must be accorded due process of law under the Fourteenth Amendment of the United States Constitution.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The Ninth Circuit Court of Appeals decision in this case is in conformity with the two earlier decisions of the Sixth Circuit Court of Appeals decisions which held that the interests of next of kin in dead bodies recognized in Michigan and Ohio allowed next of kin to bring §1983 actions challenging implementation of cornea removal statutes similar to California's. *Whaley v. County of Tuscola,* 58 F.3d 1111 (6th Cir. 1995) (Michigan). The Sixth Circuit noted that courts in each state had recognized a right of next of kin to possess the body for burial and claim by next of kin against others who disturb the body. *Whaley,* 58 F.3d at 1116; *Brotherton v. Cleveland*, 923 F.2d 477 at 482 (6th Cir. 1991) (Ohio). Those common law rights, combined with the statutory right to control the disposition of the body recognized in each state's adoption of the UAGA, were held to be sufficient to create in next of kin a property interest in the corneas of their deceased relatives that could not be taken without due process of law. *Whaley*, 58 F.3d at 1117; *Brotherton*, 923 F.2d at 482.

The Defendants in *Whaley* petitioned the Supreme Court of the United States for Writ of Certiorari, citing the same reasons set forth within the Coroner's Petition. The

Writ of Certiorari was Denied, 116 S.Ct. 476, 516 U.S. 975, 133 L.Ed.2d 404 (1995).

There exists no conflict within the United States Federal Circuits and the decision of the Ninth Circuit is in accordance with statutory and common law with regard to the right of the next of kin to possess and protect a family member's body for burial and against mutilation and organ harvesting.

II. THE DECISION BELOW WAS CORRECT

California has long recognized that the next of kin have exclusive rights of possession, control and disposition of a family member. Health and Safety Code §7100. The disturbing of a body is subject to an action for "tortious interference with a right to dispose of a decedent's remains." *Sinai Temple v. Kaplan*, 54 Cal.App.3d 1103, 127 Cal. Rptr. 80 at 86 (1976); *cf. Christensen*, 820 P.2d at 196 (permitting action for unauthorized harvesting of corneas and other organs by mortuary); *Palmquist v. Standard Acc. Ins. Co.,* 3 F. Supp. 358, 359-360 (S.D. Cal. 1933) (permitting action for unauthorized retention of organs after autopsy).

The Los Angeles County Coroner's Office is the only Coroner's office known, in the State of California, that had a policy not to ask the next of kin for permission prior to harvesting body parts for the contractual sale to a Tissue Bank. The next of kin were not afforded any form of due process prior to the removal and contractual sale of their deceased family members corneas.

The Ninth Circuit's decision and reasoning is in line with traditional common law principals serving a duty

to protect the dignity of the human body in its final disposition. The parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the corneas and other parts of the bodies of their deceased children. The Court correctly held that "With California's adoption of the UAGA, Cal. Health and Safety Code §7151.5, it statutorily recognized other important rights of the parents in relation to the bodies of their deceased children – the right to transfer body parts and refuse to allow their transfer."

III. FEDERAL CONSTITUTIONAL LAW DETERMINES WHETHER AN INTEREST RISES TO THE LEVEL OF A LEGITIMATE CLAIM OF ENTITLEMENT PROTECTED BY THE DUE PROCESS CLAUSE

The Respondents harvested organs from the deceased's family members without making any effort whatsoever to contact and request the consent to the removal and sale of the organs to a Tissue Bank.

The Ninth Circuit correctly cited that "Although the underlying substantive interest is created by 'an independent source such as State Law,' Federal Constitutional Law determines whether that interest rises to the level of a 'legitimate claim or entitlement protected by the Due Process Clause.'" *Memphis Light, Gas and Water Div. v Craft*, 436 U.S. 1, 9 (1978).

The Ninth Circuit's decision is in conformity with the Sixth Circuit's earlier decision in *Whaley* and *Brotherton*. The identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the State. See *Whaley*, 58 F.3d at 1114; *Brotherton*, 923 F.2d at 482.

The next of kin have a legitimate claim or entitlement which is protected by the Due Process Clause. A state statute or law cannot deprive the complainant of Due Process; that is the logical reason for the Civil Rights Statute 42 U.S.C. §1983.

IV. IN CONFORMITY WITH THE LOS ANGELES CORONER'S OFFICE CUSTOM AND POLICY, NO NOTICE AND DUE PROCESS OF ANY MANNER WAS AFFORDED TO THE NEXT OF KIN PRIOR TO THE REMOVAL AND SALE OF THEIR CHILDREN'S ORGANS.

The Ninth Circuit held that the Coroner's argument at the trial court level that, as a matter of law, postdeprivation process is sufficient and the parents should therefore be required to exhaust postdeprivation procedures must fail. The Court held that "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

The Respondents as parents and next of kin of their children, were not afforded any notice whatsoever prior to their childrens' organs being harvested and sold by the Coroner's office. The Coroner's office had a policy and custom not to contact any next of kin prior to the harvesting and sale of a relative's organs.

The Petitioners argue in their brief that time is of the essence and the optimum time for removing corneal tissue is within 6 hours of death. This argument must fail because, in numerous cases, the corneas and other organs were removed beyond the alleged 6 hour limit. In fact, the

Respondents failed to give any notice whatsoever to the relatives prior to the harvesting and sale of a family member's organs.

It is interesting to note that the Los Angeles County Coroner's Office now obtains the written and/or telephonic consent prior to the removing of any organs. This simple due process could have been afforded the Respondents.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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